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Honorable Christopher M. Alston
Chapter 11
Hearing Location: Seattle, Rm. 7206
Hearing Date: Friday, December 7, 2018
Hearing Time: 9:30 a.m.
Response Date: November 30, 2018

8 UNITED STATES BANKRUPTCY COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT SEATTLE

11 In re:
12 NORTHWEST TERRITORIAL MINT, LLC,
13 Debtor.

Case No. 16-11767-CMA
CONSOLIDATED REPLY IN SUPPORT
OF FEE APPLICATIONS OF TRUSTEE
AND TRUSTEE'S PROFESSIONALS

14 I. REPLY

15 The Chapter 11 Trustee for Northwest Territorial Mint, LLC (the "Trustee"); Cascade
16 Capital Group, LLC ("Cascade") accountants for the Trustee; and K&L Gates LLP ("K&L Gates"),
17 counsel for the Trustee, hereby submit this combined Reply in support of their respective
18 applications for compensation (the "Trustee Professionals' Applications"). In support thereof, the
19 Trustee, Cascade, and K&L Gates (collectively, the "Trustee Professionals") respectfully state as
20 follows:

21 The only substantive response filed to the Trustee Professionals' Applications was the
22 Response of Counsel for the Official Unsecured Creditors' Committee to Fee Applications of
23 Trustee and Trustee's Professionals ("Committee Counsel Response") (Dkt. No. 1943).¹ Notably,

24 ¹ Two creditors, William Hanson and John W. Peterson filed unsworn letters with the Court, neither
25 of which provides a substantive response to the Trustee Professionals' Applications. Certain
26 allegations in the letters are addressed in the Reply Declaration of Mark Calvert filed in support of
this Reply. A third unsworn letter was filed by Joshua Gibbons. Mr. Gibbons is not a creditor or
party in interest of the estate, and lacks standing as he has no pecuniary interest in the dispute. *In re*

CONSOLIDATED REPLY IN SUPPORT OF FEE
APPLICATIONS OF TRUSTEE AND TRUSTEE'S
PROFESSIONALS - 1

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1 the Committee Counsel Response is not filed on behalf of the Official Unsecured Creditors’
2 Committee (the “Committee”); rather, it is filed on behalf of counsel for the Committee
3 (“Committee Counsel”).

4 Committee Counsel acknowledges that this has been a difficult proceeding, and that from the
5 commencement, a Chapter 11 reorganization process provided the only avenue for recovery by
6 unsecured creditors. As set forth in the Declaration of Mark Calvert in support of this Reply, this
7 case was administratively insolvent from the beginning, yet he and his professionals nonetheless
8 took on the task of attempting to resuscitate and reorganize the company, at significant financial risk
9 to themselves. The Trustee and his Counsel have worked tirelessly throughout this case, in an effort
10 to drive a return to unsecured creditors.

11 For a good portion of this case, the Trustee, in his professional judgment thought that he
12 would be able to successfully reorganize the business. Even after it became clear that reorganization
13 would not be possible, the Trustee and his professionals did what they could to liquidate assets and
14 satisfy their statutory duties to the Court and its creditors. They did so knowing that they would not
15 be able to recover their fees in full. The fact that the Trustee and his counsel were not, at times,
16 successful in their efforts is not a basis, in and of itself, to deny allowance of an administrative
17 expense for such efforts. The time expended by the Trustee and his professionals is compensable
18 because is reasonable and necessary to the administration of the case and because the Trustee
19 believed that at the time such services were incurred they would benefit the estate.

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Fondiller, 707 F.2d 441, 442 (9th Cir. 1983)(“ Only those persons who are directly and adversely
23 affected pecuniarily by an order of the bankruptcy court have been held to have standing to appeal
24 that order”). Furthermore, Mr. Gibbons, a blogger, does not offer admissible evidence relevant to
25 the Court’s inquiry. His letter is full of factual inaccuracies, hearsay, innuendo, and irresponsible
26 speculation. The Gibbons letter should be stricken under BR 7012(g) and Western District of
Washington LCR 7(g).

1
2 **A. Legal Standard Applicable to the Court’s Consideration of Fee Applications.**

3 Committee Counsel, in large part, questions whether the Trustee and his professionals should
4 be compensated for efforts that were ultimately not successful and did not provide a tangible benefit
5 to the estate. Focusing on the results achieved from the services rendered is “not the proper method
6 to determine reasonableness of compensation under § 330.” *In re Acme Cake Co., Inc.*, 495 B.R.
7 212, 220 (Bankr. E.D.N.Y. 2010) (awarding fees and expenses, less a 20% voluntary reduction
8 where they were “generally reasonable at the time they were performed”).²

9 The Bankruptcy Code, in Section 330, provides that the Court may award a trustee and his
10 Court-approved counsel “(A) reasonable compensation for actual, necessary services . . .”; and (B)
11 reimbursement for actual, necessary expenses.” Services are necessary if they were “reasonably
12 likely to benefit the estate.” *In re Kohl*, 421 B.R. 115, 125 (Bankr. S.D.N.Y. 2009). “An objective
13 test is used, and examines whether a reasonable attorney would have performed those services under
14 the same circumstances.” *In re Acme Cake Co. Inc.*, 495 B.R. at 218. Focusing on the results
15 achieved from the services rendered “is not the proper method to determine reasonableness of
16 compensation under § 330.” *Id.* at 220. The services are to be judged objectively at the time they
17 were rendered—not with the benefit of 20-20 hindsight. *Id.* (“Reasonableness of services is not
18 determined through hindsight.”). *See also In re Value City Holdings, Inc.*, , 2010 WL 3705285, at
19 *3 (Bankr. S.D.N.Y. Sept. 22, 2010) (“in evaluating the award of professional fees, courts

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21 _____
22 ² Committee Counsel relies on *In re Stoecker*, 118 B.R. 596 (Bankr. N.D. Ill. 1990) for the
23 proposition that in an unsuccessful Chapter 11 case, the Court should reduce a trustee’s
24 compensation for not achieving the “maximum results.” In doing do, Committee Counsel offers an
25 isolated quote without explaining the context of the case. In *Stoecker*, the trustee did not seek an
26 award of compensation based on his standard hourly rate, rather he sought an award of the full
statutory maximum under 11 U.S.C. § 326(a) (in an effect an enhancement to his normal hourly
rate). In contrast to *Stoecker*, where the trustee sought more than fees and costs actually incurred at
his regular hourly rate, the Trustee in this case incurred far more in fees and costs than the cap, and
rather than seeking an enhancement, is seeking only the capped amounts as allowed under
Section 326(a) of the Bankruptcy Code.

1 objectively consider whether the services rendered were reasonably likely to benefit the estate from
2 the perspective of the time when such services were rendered”); *In re Schupbach Investments, LLC*,
3 521 B.R. 449, 2014 WL 6680122, at *8 (10th Cir. BAP Nov. 25, 2014) (unpublished opinion) (“The
4 appropriate time for measuring benefit to the estate is as of the time the services are provided, and
5 not at the time the court ultimately reviews the fee application.”); *In re Kitts Dev. LLC*, 474 B.R.
6 712, 720 (Bankr. D.N.M. 2012) (“benefit to the estate should be measured as of the time the services
7 are provided, not at the time the Court ultimately reviews the fee application”). The Ninth Circuit
8 has expressly rejected the proposition that only services that actually result in a benefit to the estate
9 are compensable. *In re Smith*, 317 F.3d 918, 926-27 (9th Cir. 2002) (abrogated on other grounds by
10 *Lamie v. United States Trustee*, 540 U.S. 526, 531–39 (2004)) (“services that are reasonably likely to
11 provide an identifiable, tangible and material benefit to the debtor's estate can be compensated, even
12 if they do not actually provide such a benefit”). *See also In re Woerner*, 783 F.3d 266, 276 (5th Cir.
13 2015) (“§ 330 embraces the ‘reasonable at the time’ standard for attorney compensation”).

14 Simply put, it is not the case that this Court in determining whether it should approve
15 compensation for time rendered by the Trustee and his professionals, should disallow time spent on
16 endeavors that were ultimately unsuccessful or that did not derive a specific identifiable monetary
17 benefit to the estate. To the extent that Committee Counsel suggests otherwise, its position is
18 contrary to controlling law, and the position that the Committee Counsel itself has taken in its fee
19 application.³

20
21 ³ Committee Counsel in its fee application states that courts analyzing the requirements for fee
22 applications “have made it clear that ‘benefit to the estate’ means that the services were ‘reasonably
23 likely’ to benefit the estate at the time the services were rendered.” Supplemental Declaration of
24 Mark D. Northrup [Dkt. No. 1931], at p. 11 (citing *In re Mednet*, 251 B.R. 103, 108 (9th Cir. BAP
25 2000) (internal quotations omitted). Moreover, Committee Counsel acknowledges that “benefit to
26 the estate” is “not restricted solely to monetary benefit.” *Id.* (quoting *In re Kohl*, 95 F.3d 713, 715
(8th Cir. 1996). Committee Counsel argues that its services were rendered in accordance with the
powers delegated to committees under the Bankruptcy Code and therefore are compensable because
they “promoted the bankruptcy process or administration of the estate” *Id.* at 12 (quoting *In re*
Crown Oil, Inc., 257 B.R. 531, 541 (Bankr. D. Mont. 2000)).

1 **B. Committee Counsel Concerns with Trustee Application.**

2 Committee Counsel does not object to specific time entries. Nor does Committee Counsel
3 argue that a specific dollar amount of the fee applications should be disallowed. Rather, Committee
4 Counsel raises various “concerns” with respect to certain categories of the time entries of the Trustee
5 and the Trustee’s professionals. Committee Counsel, in large part, questions whether the Trustee and
6 his professionals should be compensated for efforts that were ultimately not successful and did not
7 provide a tangible benefit to the estate.

8 1. Investigation-Fraud

9 Without expressly asking the Court to deny fees, Committee Counsel states that services
10 performed by the Trustee in investigating potential fraud and cooperation with the United States
11 Government are unlikely to have provided any benefit to the estate. The Trustee was appointed
12 pursuant to 11 U.S.C. § 1104, which provides for the appointment of a Chapter 11 Trustee for cause,
13 including “fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by
14 current management,” or if appointment of a Trustee is in the best interest of creditors. 11 U.S.C. §
15 1104. Following appointment, a Chapter 11 Trustee has certain statutory duties, including, but not
16 limited to the following:
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- 18 • Furnishing such information concerning the estate and the estate’s administration as
19 is requested by a party in interest (11 U.S.C. § 704(a)(7), made applicable to chapter
20 11 trustees by 11 U.S.C. § 1106(a)(1));
21 • investigate the acts, conduct, assets, liabilities, and financial condition of the debtor,
22 the operation of the debtor’s business and the desirability of the continuance of such
23 business, and any other matter relevant to the case or to the formulation of a plan (11
24 U.S.C. § 1106(a)(3)); and
25 • file a statement of any investigation conducted, including any fact ascertained
26 pertaining to fraud, dishonesty, incompetence, misconduct, mismanagement, or
irregularity in the management of the affairs of the debtor (11 U.S.C. §
1106(a)(4)(A)).

 Not only did the Trustee have a statutory duty to investigate the financial affairs of the estate
including any fraudulent conduct by the debtor, but creditors, including many that stored precious

1 metal with the Debtor, were understandably anxious to understand what had occurred at NWTM and
2 were requesting information regarding the Trustee's investigation of these matters.

3 Over the course of the proceeding, the United States Government issued approximately ten
4 detailed subpoenas to the Trustee compelling the production of records. This Court, and Committee
5 Counsel, are certainly aware of the penalties for failure to comply with a lawfully issued subpoena.
6 The Trustee was compelled to spend a significant amount of time complying with his legal
7 obligation to respond to the subpoenas and answer follow-up questions of the government. The
8 Trustee did not create independent analyses or reports for the sole purpose of facilitating the
9 government's investigation. But the Trustee did fulfill his obligation to respond to the multiple
10 informational requests and subpoenas directed to him by the government. In sum, the fees which
11 Committee Counsel cites, whether or not they materially benefitted the estate, were incurred by the
12 Trustee in performance of his statutorily-mandated or other legal duties, and the Trustee is entitled to
13 be compensated for those services. *See In re Crown Oil, Inc.*, 257 B.R. at 540 (benefit to estate is not
14 restricted to monetary benefit and an important consideration is "whether the services rendered
15 'promoted the bankruptcy process or administration of the estate'").

16 2. Plan of Reorganization/Disclosure Statement.

17 Again, Committee Counsel relies on the incorrect standard in suggesting that the Trustee is
18 not entitled to compensation for fees incurred in the formulation of a plan and disclosure statement.
19 So long as there is a "reasonable chance of success which outweighed the cost of pursuing the
20 action," the fees related to a chapter 11 plan are compensable. *See In re Crown Oil, Inc.*, 257 B.R. at
21 541. *See also In re Kitts Dev., LLC*, 474 B.R. at 724 (allowing fees for services rendered in
22 connection with formulating a chapter 11 plan that was never filed "because, at the time such
23 services were rendered, there was a reasonable possibility of achieving success in the Chapter 11
24 case during the period of delay resulting from the bankruptcy filing"). As explained above and in the
25 Declaration of Mark Calvert filed in support of this reply, the only possibility of a meaningful return
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1 to creditors was the reorganization of the Debtor, and up until the late Spring of 2017, it was the
2 Trustee's and the Committee's shared goal to reorganize through a plan and emerge from
3 bankruptcy. In fact, the Committee demanded that the Trustee formulate and draft a plan and
4 disclosure statement for its review in October and November, 2016 and the Trustee did present a
5 draft plan to the Committee in its meeting of November 29, 2016. At the time he formulated and
6 drafted the plan, the Trustee believed that there was a reasonable chance of success in effectuating a
7 plan of reorganization. The Trustee's efforts with respect to a plan were reasonably likely to benefit
8 the estate from the perspective of the time when such services were rendered. Certainly the
9 Committee and the Committee Counsel believed so in 2016. As the court noted in *Kitts*, "if
10 compensation were routinely disallowed when a debtor's reorganization efforts are unsuccessful, it
11 'would create a chilling effect on the willingness of counsel to undertake the representation of
12 debtors in financial distress'" *Id.* at 725 (quoting *In re Coastal Nursing Center, Inc.*, 162 B.R.
13 918, 919 (Bankr. S.D. Ga. 1993)). The same holds true for court appointed chapter 11 trustees and
14 their counsel.

15 **C. Committee Counsel Concerns with Cascade Application.**

16 On June 7, 2016, the Court entered an order authorizing the Trustee to employ Cascade
17 Capital Croup ("Cascade") as accountants for the Trustee. In doing so, the Court found that
18 Cascade's principals, and its members have special expertise in the areas of management systems,
19 internal controls, operational cost accounting, corporate overhead reduction systems and automation,
20 forensic work and insolvency, and that if Cascade were not appointed, the Trustee would be required
21 to engage a national financial services firm whose rates would be significantly higher than those of
22 Cascade. Committee Counsel signed off on the order appointing Cascade as accountants effective
23 *nunc pro tunc* as of mid-April, 2016. The order authorizing the employment of Cascade specifically
24 contemplated that it would perform forensic work.

1 Contrary to Committee Counsel's insinuation, the Trustee does not seek to be compensated
2 twice for the same services, nor does he seek to circumvent the Section 326 cap. The nature of
3 Cascade's services are described in detail in its fee application and relate to specific accounting and
4 financial services functions. The Trustee's efforts in this case required an unusual amount of
5 accounting and financial expertise that necessitated the Trustee's use of Cascade. As explained in the
6 Trustee's declaration provided in support of this Reply, the financial records of NWTM were
7 incomplete, inaccurate, or nonexistent. In addition, NWTM had no internal financial accounting staff
8 that the Trustee could utilize.

9 The Court previously raised concerns regarding whether some of the time in the Cascade fee
10 application should be included in the Trustee application such that it is subject to the statutory cap.
11 As a result, the Trustee reviewed all billing entries for Cascade and materially modified the Trustee's
12 application by moving numerous entries of his time that he believed are better categorized as falling
13 under the Trustee umbrella.

14 Committee Counsel is simply incorrect in his assumption that Jessica Gilmore is not a trained
15 accountant. Her resume attached to her concurrently-filed declaration in support of this reply
16 confirms her qualifications. Moreover, Cascade Capital Group should utilize junior level support for
17 its accounting and financial services, just as any accounting firm would under the circumstances.
18 Contrary to the assertion of Committee Counsel, both Ms. Gilmore and Ms. Chappel provided
19 financial and accounting services and are well qualified to do so.

20 **D. Committee Counsel's Concerns with K&L Gates' Application.**

21 Committee Counsel acknowledges K&L Gates' willingness to work "full bore" for the last
22 two and one-half years, and acknowledges K&L Gate's contributions to this proceeding, yet raises
23 "concerns" with its fees and costs, again applying the incorrect standard as to whether fees and costs
24 are compensable by looking at them with the benefit of hindsight.
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1 1. Litigation versus Ross Hansen and Diane Erdmann

2 Committee Counsel appears to criticize K&L Gates for litigating with Ross Hansen and
3 Diane Erdmann. With respect to Mr. Hansen, the Trustee remains convinced that litigation was
4 necessary to the Trustee's efforts to preserve the value of the business of the estate. The Trustee's
5 motion to hold Hansen in contempt for violation of the automatic stay was a necessary response to
6 the actions of Hansen which were designed to destroy the estate's business. Hansen, after
7 surrendering control over the business, attempted to destroy the Debtor's business by
8 communicating with employees (discussing with one employee whether she would be willing to,
9 among other things, sabotage valuably machinery and software), and seeking to persuade them to
10 terminate their employment. The Trustee consulted with the Committee about his intentions to seek
11 a Court order holding Mr. Hansen in contempt. Although the Court ruled that Hansen had not
12 technically violated the automatic stay by his actions, the Court cautioned Hansen regarding his
13 obstructive actions. After the Court hearing on the Trustee's stay motion, Mr. Hansen's
14 communications with employees were curtailed and his overtly obstructive tactics diminished. The
15 Trustee could simply not, through inaction, allow Mr. Hansen to sabotage the business of the estate.

16 The Committee Counsel expresses concern regarding fees in the "Trustee v. Erdmann"
17 category. Contrary to the Committee Counsel's suggestion, the fees in this category were not limited
18 to an evidentiary hearing on the source of the advance fee deposit paid to the Tracey Law Group. As
19 the Court will recall, the issue of the source of gold coins liquidated to fund the advance fee deposit
20 came up mere weeks into the proceeding. While Committee Counsel is right that the advance fee
21 deposit was approximately \$150,000, \$50,000 of which was paid with cash and \$100,000 from the
22 proceeds of gold liquidation, Diane Erdmann testified at trial that the bag of gold that was taken to
23 the Seattle Coin Shop for liquidation contained more than the \$100,000 of gold that the Coin Shop
24 purchased. Rather it contained approximately \$200,000 in gold. Accordingly, the investigation
25 encompassed not only the source of the gold sold to the Coin Shop, it also encompassed the source
26

1 of disposition of significantly more. The Trustee was aware of that significant quantities of precious
2 metal had not been accounted for by the Debtor. The Trustee eventually determined that there was
3 more than \$13 million of missing precious metal that could not be accounted for. The Trustee's
4 litigation with Erdmann furthered his investigation of these important matters. Moreover, given the
5 stage of the bankruptcy, the investigation was by necessity a broad inquiry into Diane Erdmann's
6 role at the company and how the company managed and tracked bullion.

7 With respect to the American Express Fraudulent Transfer Action, Committee Counsel raises
8 concern that Ms. Erdmann is effectively destitute and has no ability to satisfy a judgment. But the
9 Trustee discovered that Ms. Erdmann sold hundreds of thousands of dollars in bullion over the
10 course of the case. *See* Dkt. No. 1053. Given Ms. Erdmann's transfers of assets, there are potential
11 sources of recovery other than Ms. Erdmann. Finally, the bullion that was seized by the King County
12 Sheriff to which Ms. Erdmann claims ownership is an additional potential source of recovery for the
13 estate based on its judgment against Ms. Erdmann.

14 Again, the compensability of fees does not turn on the question of whether the Trustee
15 prevailed in his litigation, but on whether such services were reasonable at the time. Here, the
16 Trustee did prevail in his litigation with Erdmann on the American Express charges. Regardless,
17 under the circumstances of this case, K&L Gates submits that the litigation in this action was
18 reasonable and necessary.

19 2. Plan and Disclosure Statement.

20 As described above, the Plan and Disclosure Statement were draft at the request of and in full
21 consultation with the Committee. At the time the Plan and Disclosure Statement were drafted, in
22 October and November of 2016, it was anticipated that the Trustee could stabilize the company and
23 reorganize through a Chapter 11 Plan. The plan was presented to the Committee. Under the
24 circumstances of this case, K&L Gates submits that the formulation and draft of the plan was
25 reasonable and necessary as it was the only path under which creditors could receive a return.
26

E. Creditor Reaction.

As the Committee Counsel acknowledges, this proceeding has been extremely complex and difficult. It was no secret to the members of the Committee, including the Pehls and David James, that the only chance of a recovery by unsecured creditors was a successful reorganization, a prospect that was far from guaranteed. The Trustee and his professionals took on the risk associated with working on such a case, extending large amounts of credit in the form of fees, advanced costs and substantial amounts of time, all in an effort to achieve a successful result. The Trustee's actions were taken in consultation with the Committee, an entity which failed to take a position on many significant substantive matters. When, despite the Trustee's efforts, reorganization of the business could not be achieved, some former members of the Committee have taken to criticizing the Trustee through unfounded and untruthful allegations. Paula and Richard Pehl, for example, accuse the Trustee of failing to disclose assets—an accusation for which they offer no admissible evidence other than their own speculation. They suggest that there are valuable assets of the estate that have not been administered by the Trustee relating to the products manufactured in China—an untruthful accusation for which they offer no admissible evidence other than their own speculation.

CONCLUSION

In sum, Committee Counsel is incorrect in its expression of the legal standard upon which it relies in support of its concerns. The work performed by the Trustee Professionals was reasonable and necessary at the time that it was performed, and much of the work was done in consultation with Committee Counsel and its client. It is always easy, in hindsight, to criticize decisions that were made in good faith and on reasonable beliefs at the time, which is why the Ninth Circuit expressly rejected the proposition that only services that actually result in a benefit to the estate are compensable. Committee Counsel expresses concerns that certain actions taken by the Trustee Professionals did not provide a benefit to the estate. In so doing, Committee argues that Court should apply a legal standard different from the standard that it argues should apply to its own fees. While

1 he does not expressly request that the Court reduce or deny portions of the Trustee Professionals'
2 fees, his implication that the Trustee Professionals are not entitled to full compensation should not
3 inform the Court's decision. The Trustee and his professionals have provided significant services to
4 the estate, all of which were reasonable, and all of which are compensable under the applicable legal
5 standard.

6 The Trustee and his professionals have now administered the substantial majority of this very
7 complicated and difficult case. Ownership of the assets of the estate has been confirmed. All stored
8 inventory in the possession of the Trustee has been returned to storage customers. The vast majority
9 of the assets have now been liquidated. All employee issues have been addressed. Difficult issues
10 regarding landlords and leased property have been resolved. All secured claims have been satisfied.
11 The Trustee has proposed resolution and payment of all of the remaining filed administrative claims
12 in the case other than professional claims. The result of this case has been unfortunate for all
13 involved, including the professionals. The Trustee and his professionals will suffer considerable
14 economic loss because the case is administratively insolvent. The Trustee and his professionals
15 should not be further penalized, through the disallowance of reasonable fees and costs, when their
16 efforts were made in a good faith attempt to return a distribution to creditors under extremely
17 difficult circumstances.

18 DATED this 4th day of December, 2018.

19
20 K&L GATES LLP

21 By /s/Michael J. Gearin

22 Michael J. Gearin, WSBA #20982

23 David C. Neu, WSBA #33143

24 Brian T. Peterson, WSBA #42088

25 Attorneys for Mark Calvert, Chapter 11 Trustee
26

CONSOLIDATED REPLY IN SUPPORT OF FEE
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That she is a paralegal in the law firm of K&L Gates LLP, and on December 4, 2018, she caused the foregoing document to be filed electronically through the CM/ECF system which caused Registered Participants to be served by electronic means, as fully reflected on the Notice of Electronic Filing.

Executed on the 4th day of December, 2018 at Seattle, Washington.

/s/ Denise A. Lentz
Denise A. Lentz